

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ALEXANDER SMITH	:	
Complainant	:	
	:	
v.	:	F-2012-2315538
	:	
PHILADELPHIA GAS WORKS	:	
Respondent	:	

EXCEPTIONS OF ALEXANDER SMITH - COMPLAINANT

I. INTRODUCTION

Pursuant to 52 Pa. Code § 5.533, Complainant Alexander Smith (hereinafter “Complainant”) hereby files the following exceptions to the Initial Decision (hereinafter “I.D.”) issued on March 14, 2014 in this case. In these Exceptions, Complainant maintains that Administrative Law Judge Angela T. Jones (hereinafter “ALJ”) erred in finding that “unauthorized use” of gas service occurred at Complainant’s property from February 1, 2010 through November 15, 2011, that Complainant is responsible for this unauthorized use, and that the charges may be reasonably calculated based on Complainant’s gas usage in the period July 4, 2004 to July 7, 2005.¹

In Exception No. 1, Complainant contends that the ALJ’s finding of unauthorized use was not supported by the weight of the evidence and could not result from a proper analysis of the burden of proof. In Exception No. 2, Complainant contends that the ALJ made an error of law in concluding that Respondent Philadelphia Gas Works’ (hereinafter “PGW”) Tariff

¹ Throughout these Exceptions, the term “unauthorized use” refers to the activity described in 52 Pa. Code § 56.2, which defines unauthorized use of utility service as, “Unreasonable interference or diversion of service, including meter tampering (any act which affects the proper registration of service through the meter), by-passing unmetered service that flows through a device connected between a service line and customer-owned facilities and authorized service restoral.”

(hereinafter “Tariff”) was applied correctly in determining that Complainant can be held responsible for unmetered usage that resulted from the alleged tampering of a third party acting without Complainant’s knowledge or consent. In Exception No. 3, Complainant contends that the ALJ’s determination that estimated unmetered usage for the period February 1, 2010 through November 15, 2011 should be based upon Complainant’s actual consumption from July 4, 2003 to July 7, 2004 is not supported by the evidence.

II. EXCEPTIONS

Exception No. 1. The ALJ erred in finding that Complainant failed to sustain his burden of showing that unauthorized use did not occur. I.D., at 28; Smith Main Brief (hereinafter “Smith M.B.”), at 8-20.

The ALJ’s conclusion that Complainant failed to show that unauthorized use had not occurred at the service address is against the weight of the evidence and failed to comply with applicable Commission rules concerning burden of proof. The applicable burden of proof has been clearly articulated in prior Commission decisions. Smith M.B., at 8-9. Application of the burden in this case should have required the ALJ to determine whether Complainant made a *prima facie* showing that it is more likely than not that PGW wrongfully billed for unauthorized gas use; whether PGW presented evidence of co-equal weight to overcome Complainant’s initial showing; and, if PGW did present evidence of co-equal weight, whether Complainant presented additional evidence to sufficiently rebut PGW’s evidence.

The ALJ’s finding that unauthorized use occurred rests solely on the uncorroborated testimony of one of PGW’s witnesses and reductions in Complainant’s metered gas usage. I.D., at 22-23. The weight assigned by the ALJ to PGW’s evidence is inexplicable, particularly in light of the inaccuracies contained in PGW’s slim record regarding the condition of the meter and conditions at the service address on the day the meter was removed. Smith M.B., at 12-15.

Complainant presented evidence that PGW wrongly reported that a gas range and gas water heater were on the fuel line on the day the meter was removed and wrongly billed Complainant for gas range use during the period November 15, 2007 to November 15, 2011 (hereinafter “disputed period”). PGW Exhibit 5; Tr. 97-98; I.D., at 26-27. Complainant also rebutted all of PGW’s evidence corroborating that the meter was impaired. Smith M.B., at 12-15. The ALJ found Complainant’s evidence persuasive and concluded that none of PGW’s corroborating evidence is convincing. I.D., at 21.

At the initial hearing, Complainant testified and introduced eighteen exhibits to corroborate his testimony that he did not engage in meter tampering during the disputed period (Tr. 42; I.D., at 4-6); did not authorize anyone else to engage in meter tampering (Tr. 42); did not utilize a gas cooking range or hot water heater during the disputed period (Tr. 12-16); reduced and ultimately eliminated his gas heat use during the cold weather months of the disputed period in response to economic instability and job loss (Tr. 17-42); and that during the disputed period he experienced a burglary in which a man broke into his basement, was apprehended inside the home, and that a hammer and screwdriver were recovered from the scene. Tr. 42-43.

The Complainant did not merely assert that he reduced his consumption habits and relied on non-gas appliances during the disputed period but also offered substantial corroborating evidence in support of his assertions. Smith M.B., at 15-20. He testified that in response to economic instability as a result of job loss in 2005, he reduced his gas heat use and instead heated with an electric radiator in the bedroom and a kerosene heater in the living room. Tr. 17-41. In support of this testimony, the Complainant offered into evidence a letter from his employer documenting the first phase of his unemployment (Smith Exhibit 3); pictures of the non-gas appliances that he used in lieu of gas appliances (Smith Exhibit 1); bank statements

showing multiple kerosene purchases during the winter of 2009-2010 (Smith Exhibit 4 Unredacted); and PECO electric usage data covering the period of alleged theft and showing increased electrical consumption during cold weather versus warm weather periods. Late-filed Smith Exhibit 5. Together, this evidence corroborated Complainant's assertion that he was not stealing gas during the disputed period in question but was instead conserving gas and using non-gas appliances.

The first question that the ALJ should have considered in determining whether Complainant met his burden of proof is whether he made a *prima facie* case that he was wrongly billed for unauthorized use. Prior decisions have not delineated the elements of a *prima facie* case contesting unauthorized use charges; however, they have uniformly reasoned that more than mere assertions of innocence or denials of culpability that are of a general nature are required. Smith M.B., at 16-17. Here, the Complainant presented substantial, detailed information in support of his position.

The Complainant's substantial evidentiary showing should have been contrasted with PGW's purely speculative determination of tampering/unauthorized use. This balance should have taken place because a proper analysis of the burden of proof requires that once the ALJ has determined that Complainant has made a *prima facie* showing, the burden of persuasion shifts to the Respondent PGW to present evidence of co-equal weight. Smith M.B., at 9. It is not enough that PGW presented some testimonial evidence in response to Complainant's showing but that evidence should have been equal in weight to that set forth by the Complainant. At the initial hearing, PGW called four witnesses and introduced seven exhibits. PGW did not call a single witness who *documented* the condition of the meter on the day that it was removed from the

property. PGW did not introduce a single *document* that *specifically* described how the meter was allegedly tampered. Smith M.B., at 12-15.

PGW's witness Phillip Farinas testified from memory that he observed the ERT head on the meter was cocked. Tr. 141-144. It is uncontested that Mr. Farinas did not document his observation in any way. He did not photograph the meter and he did not prepare any record of what he observed. I.D., at 13. In addition, Farinas did not testify with specificity about what he observed. When questioned by his attorney at the hearing, Farinas stated that the ERT was "cocked *at about* a 45 degree angle" (Tr. 141) and "cocked *at like* a 45 degree angle." Tr. 144. Emphasis Added. The only documentary evidence introduced by PGW was not prepared by Mr. Farinas and did not specifically describe the condition of the ERT. Tr. 187; Smith Exhibit 13; I.D., at 14. The ALJ found Farinas' testimony credible but found all of PGW's corroborating evidence unconvincing:

The data produced by the Company to corroborate that the meter was tampered is not convincing. The tamper counts are explained away by PGW's own witness as the tilting done by PGW to get the meter out of the service address and transport it to the meter shop for testing. Tr. 209-210. The manual read is almost the same as the auto read on the meter. The ERT was not broken and the reporting of red caps missing was not contemporaneous to the time the leak and alleged tamper was discovered. Rather, the red caps missing were reported in documents dated January 27, 2012, or more than two months after the leak was detected and investigated. Tr. 97, PGW Exhibit # 2. The meter was in the custody of PGW during this period and the missing red caps of the meter could reasonably have not been due to any alleged tampering by the Complainant since it was not reported at or near the time of the leak.

The meter testing data that the Company produced is not convincing. The Company needs more than this data to show that unauthorized usage of gas occurred on or before November 15, 2011.

I.D., at 21. A single, uncorroborated memory recalled nearly two years after the occurrence of an event, by a witness who did not document what he observed, cannot reasonably be considered evidence of co-equal weight.

A second question is whether the uncorroborated memory of PGW's witness combined with reductions in Complainant's metered gas usage is enough to shift the burden back to the Complainant. Here it should not. The ALJ's determination that a reduction in Complainant's metered gas usage is attributable to unauthorized use is against the overwhelming weight of the evidence. Complainant's testimony concerning his metered usage is supported by PGW's own data. PGW Exhibit 1 shows that the Complainant began to reduce his consumption after he was removed from PGW's CAP in August 2002 and made the most significant reductions in metered usage after 2005, which is when the Complainant testified that he began to experience economic instability as a result of job loss.

Not only did PGW fail to produce any documentary evidence to show that the meter was altered in the manner described by its witness, but the company also did not introduce any evidence to show that the meter was incapable of accurately measuring gas in the state in which it was allegedly found, i.e., that the meter cocked "at like a 45 degree angle" would have resulted in the passage of unmetered gas, notwithstanding that PGW had the meter in its possession and was uniquely situated to conduct such testing. Smith Reply Brief (hereinafter "Smith R.B."), at 2-4. To the contrary, the only testing conducted by PGW revealed that the meter was capable of measuring gas accurately. PGW Exhibit 6; Smith R.B., at 3-4. No additional testing was conducted and PGW chose to refurbish the meter that was removed from Complainant's property and installed it into a new property. Tr. 121. In response to Complainant's evidence that reductions in metered gas use were based on changes in his consumption habits and reliance on non-gas appliances, PGW pointed to the decrease in Complainant's metered use as evidence of unmetered use. PGW's uncorroborated witness testimony and Complainant's reductions in metered gas usage is not legally sufficient support for a finding of unauthorized use in this case.

The final question that the ALJ should have asked in properly analyzing the burden of proof in this case is whether, assuming *arguendo* that PGW did present evidence of co-equal weight, Complainant then successfully rebutted PGW's evidence. Again, the record evidence weighs in Complainant's favor. The fact that PGW's witness did not document his observations of alleged tampering on the day the meter was removed is beyond dispute. Complainant's reductions in metered gas use deserve further analysis. The ALJ cites to the Commission's decision in 1305 Walnut Street d/b/a Holiday Inn Express v. PGW as support for her conclusion that Complainant's decrease in gas usage can most adequately be explained by a finding of unauthorized use. I.D., at 24. In Holiday Inn, there was a reduction in billed usage preceding the discovery that the metering system had been impaired. 1305 Walnut Street. d/b/a Holiday Inn Express v. PGW, PUC Docket Number C-2012-2337290 (Final Order entered January 30, 2014). The normal level of usage was easily established on the basis of increased usage levels after the meter system had been repaired. *Id.* Holiday Inn is easily distinguished from the instant case. Here, there is no evidence reflecting usage after the meter was removed. Additionally, unlike the complainant in Holiday Inn, Complainant has put forward a plausible explanation for the decreased usage during the *entire* disputed period.

The Complainant testified that he began to reduce his use after 2002 when he was removed from PGW's CAP and lost the benefit of a fixed, affordable monthly gas bill. Tr. 17. He further reduced his use after 2005 when he lost his job. Tr. 17-18. He used varying small amounts of gas heat during periods of episodic employment from 2006 to 2009 (Tr. 41-42) and he virtually eliminated his gas use after August 2009 until the meter was removed because he was laid off during that time. Tr. 42. The ALJ concluded that the most significant reductions, and therefore the unauthorized use, occurred between February 1, 2010 to November 15, 2011,

but Complainant's reduced use is fully explained by his testimony that after August 2009, "I no longer heated my house with the gas heat ---furnace heat, and I only heated my -- I only had the pilot light on for a certain amount of time and I heated solely with kerosene and electrical radiator in the bedroom." Tr. 42. Small amounts of gas use during this timeframe are adequately explained by Complainant's testimony on cross examination:

Q. Did you see any advantage of having a service available to you even though it's in the testimony that you weren't using any gas?

A. Well, one of the factors involved was in case it was bitter, bitter cold, I would want to have the furnace heat available for a night or two.

Tr. 54. Complainant's testimony that he consumed virtually no gas heat after 2009 is supported by PGW's own evidence. PGW's Contacts for Account show that in April 2010, Complainant called PGW and reported that his bills were too high and that he was not using gas. PGW Exhibit 2. This behavior is completely inconsistent with the ALJ's view that the Complainant was benefiting from unmetered usage at the time and that his argument for conservation efforts is unconvincing. I.D., at 24. Complainant's evidence of conservation amply rebuts PGW's evidence of unauthorized use. The ALJ's determination that unauthorized use occurred at the service address is not supported by the weight of the evidence and is based on a flawed application of Commission rules regarding burden of proof.

Exception No. 2. The ALJ erred in concluding that Complainant failed to prove that the Tariff at issue was applied incorrectly. I.D., at 28; Smith M.B., at 7-8.

The ALJ made an error of law in concluding that if tampering occurred, the identity of the person who did the tampering is irrelevant. I.D., at 16. To the contrary, the identity of the person who did the tampering is germane to the determination of whether PGW can legally demand payment for unauthorized use charges from the Complainant as a precondition to

providing service. PGW's Tariff sets limits on when PGW can demand full upfront payment from an applicant for unauthorized use. Under the Tariff, "The Company shall not refuse to provide Gas Service to an Applicant who is not responsible for the damage or for the unauthorized use of Gas." PGW Tariff Section 8.3.C.² Having found that the Complainant was not responsible for the meter tampering, the ALJ should have concluded that PGW violated its Tariff by refusing to provide service to the Complainant until charges for unauthorized use were paid in full.

The Commission has expressly endorsed the prohibition contained in Section 8.3.C. In PGW's 2006 rate case, the Commission denied PGW's request to remove this language from its Tariff. Pa. P.U.C. v. Philadelphia Gas Works, Docket No. R-00061931, Opinion and Order, entered September 29, 2007, at 105-07.³ The ALJ's recommendation in that case, to deny PGW's proposal to eliminate this tariff language, was upheld by the Commission, over PGW's exception. The Commission agreed with the ALJ that the Tariff section provided clarification to consumer protections that are not explicit in Commission statutes or regulations. The ALJ in the instant matter failed to recognize this explicit consumer protection.

Here, the ALJ reasoned that because the Complainant was the responsible ratepayer at the time of the alleged tampering and benefited from the impaired meter, then the Complainant is responsible for the effect of the impaired meter. I.D., at 24. PGW's Tariff cannot and should not be read to define responsibility so as to include unauthorized use/tampering that occurs without

² There is no dispute that Complainant was an applicant at the time of filing his Complaint against PGW. See 52 Pa. Code § 56.2 for definition of applicant. Complainant requested service restoration in 2012 but was prevented by PGW's demand for full payment of unauthorized use charges. PGW Exhibit 2.

³ In 2006-07, the PGW Tariff section 8.3.D contained identical language to the section 8.3.C at issue here: "The Company shall not refuse to provide Gas Service to an Applicant who is not responsible for the damage or for the unauthorized use of Gas." Pa. P.U.C. v. Philadelphia Gas Works, Docket No. R-00061931, Opinion and Order, entered September 29, 2007, at 105-07.

the knowledge, consent, or enablement of the customer. The facts show that any alteration to the meter was effectuated by a third party without Complainant's consent. There was no evidence introduced to suggest that Complainant permitted or enabled a third party to access PGW's meter or to tamper with it. At the hearing, PGW introduced evidence to show that when it arrived at Complainant's property as part of a larger gas leak investigation, it was unable to gain entry without assistance from the Philadelphia Fire Department. Tr. 140. The Complainant introduced evidence to show that during the period in dispute he was the victim of a burglary. The Complainant testified that during the disputed period, "there was a burglary in my house [...] where police apprehended a burglar who was in my basement dismantling pipes." Tr. 42-43. In support of his testimony he introduced a police report to show that a burglary did in fact occur at his home in 2010. Smith Exhibit 6. There is no evidence to suggest that Complainant failed to appropriately secure the account premises, and/or PGW's meter, or otherwise enabled the alteration of PGW's property.

The ALJ found it reasonable to conclude that the burglary caused the meter to be impaired (I.D., at 23) but still concluded that PGW did not violate its Tariff when it terminated service to Complainant and required full payment of charges for gas allegedly stolen as a condition for service restoration. This was in error because PGW's Tariff does not permit it to deny service to an applicant who is not responsible for the unauthorized use. The ALJ never analyzed Section 8.3.C of the Tariff and her determination that the Tariff was correctly applied was based instead on Section 8.3, which states that in the event of tampering the customer shall pay the amount which PGW estimates is due even if usage is not registered on the meter. The Complainant does not contest that PGW has the authority to bill for estimated unmetered gas usage in cases in which the customer is responsible for meter tampering. Rather, the

Complainant contests that a customer who is not responsible for the tampering can be held responsible for the full upfront payment of unauthorized use charges as a condition for service. PGW's Tariff does not support, but rather prohibits imposition of theft liability upon a customer for acts of a third party that occur without the customer's knowledge or consent. Having found it plausible that the burglary caused the meter to be impaired, the ALJ should have concluded that PGW violated Section 8.3.C of its Tariff by refusing to provide service to the Complainant until charges for alleged unauthorized use for which Complainant was not responsible were paid in full.⁴

Exception No. 3. The ALJ erred in ordering that the bill be calculated using the period from July 4, 2003 through July 7, 2004 as the basis for estimating Complainant's post February 1, 2010 usage. I.D., at 28; Smith R.B., at 4-6.

The ALJ's finding that the Complainant is responsible for unmetered usage from February 1, 2010 to November 15, 2011 and that the estimated use during that time should be based upon Complainant's usage levels from July 4, 2003 to July 7, 2004 is not supported by the evidence. The Complainant introduced substantial evidence to show that he reduced his gas consumption habits and relied on non-gas appliances before and during the disputed period. Smith M.B., at 15-20. PGW has not alleged meter tampering prior to 2007 and the ALJ found that the meter was not tampered prior to February 1, 2010. I.D., at 20. The ALJ rejected PGW's four year period of unauthorized use because of her finding that the burglary caused the meter to be impaired in February 2010. The ALJ correctly rejected PGW's estimated bill for the period of unauthorized use because, *inter alia*, it was based on historical usage during a period when the

⁴ Complainant concedes that he resided at the property throughout the disputed period. As the resident at the property, he recognizes that he would be legally required to pay, pursuant to 52 Pa. Code § 56.14, for unmetered gas usage that occurred. Should it be determined that unbilled gas has been consumed at the premises, the charges for such gas must be billed and collected under the makeup bill procedure set forth in Chapter 56 § 56.14.

Complainant was enrolled in the PGW's CAP and might be expected to use more gas than he normally would. I.D., at 26.

The ALJ was not persuaded that the CAP billing year was the only year on which an estimate could be based because "there are periods that span a year where there is no estimated meter reading and the Complainant is not a CAP customer." I.D., at 26. She then arbitrarily selected the period from July 4, 2003 to July 7, 2004 as the basis for the estimated unmetered gas. I.D., at 26.⁵ It was unreasonable for the ALJ to select a billing year that did not reflect Complainant's efforts to conserve gas, particularly in light of the ALJ's finding that there was no meter tampering prior to 2010. PGW did not present any evidence to show that there was meter tampering prior to 2007 or that Complainant's bills were based on anything other than actual use. Having concluded that Complainant was lawfully using gas service prior to 2010 and absent a determination that Complainant's bills are inaccurate prior to that time, the ALJ should have recognized Complainant's usage reduction efforts in the calculation of the new estimated bill.

The usage data clearly demonstrates a decrease in usage after 2005, which is consistent with Complainant's testimony that the year 2005 is when he began his most significant conservation efforts. PGW Exhibit 1. The ALJ rightly concluded that 2003 to 2004 was a year in which there were actual non-CAP billings, but this was not a year when Complainant utilized significant conservation efforts, which he described in testimony as "augment[ing] the heat with an electric radiator in my bedroom and kerosene heater." Tr. 17-18. July 2005 to July 2006 would have been a more appropriate year for the estimate, as this was a year in which the Complainant received actual non-CAP bills and it was also a year in which his conservation efforts were completely underway. The July 2005 to July 2006 use also predates the date of the

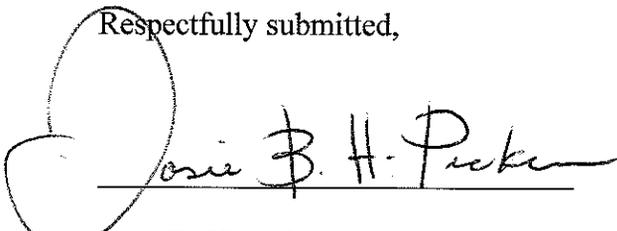
⁵ The problem of determining the appropriate year for comparison is further compounded by the fact that PGW billed for actual metered use in every year, excluding the period from August 2002 to June 2003. PGW Exhibit 1.

longer alleged tampering period (2007 to 2011). In the event that the Commission should affirm the ALJ's finding that Complainant must pay for unmetered gas usage for the period February 1, 2010 until November 15, 2011, the Commission should specify that the unmetered balance should be based on the period July 2005 to July 2006, so as to properly reflect Complainant's conservation efforts.

III. CONCLUSION

For all the foregoing reasons, Complainant Alexander Smith respectfully requests that the Commission grant Complainant's Exceptions 1 and 2 and find that Complainant has sustained his burden in proving that no unauthorized use occurred at the service address and is not responsible pursuant to PGW's Tariff for the alleged tampering of a third party acting without Complainant's consent. If the Commission finds that Complainant benefited from unmetered gas use, Complainant respectfully requests that the Commission grant Exception 3, reduce the estimated amount of unmetered use to reflect Complainant's gas usage reduction efforts during the period in dispute, and declare that PGW should treat the unpaid balance as a "makeup bill" consistent with 52 Pa. Code § 56.14.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Josie B. H. Pickens", is written over a horizontal line. The signature is stylized and somewhat cursive.

Josie B. H. Pickens, Esquire
Thu B. Tran, Esquire

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Alexander Smith

April 3, 2014